No. 15-420

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL BRYANT, JR.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondent readily acknowledges (Br. 3) that his multiple tribal-court misdemeanor convictions for domestic assault are valid and did not violate the Constitution when they were obtained. See Pet. App. 7a-8a. He has never disputed the accuracy of those convictions or denied that he committed the many acts of domestic violence to which he pleaded guilty in tribal court. Although respondent received misdemeanor sentences for repeatedly choking, kicking, punching, kneeing, and beating his intimate partners, that did not stop his pattern of abuse. Congress enacted 18 U.S.C. 117(a) to address the jurisdictional vacuum that permitted offenders like respondent to harm their domestic partners in Indian country again and again, while facing only misdemeanor punishment reserved for minor crimes. By creating a federal felony that "represents the first true effort to remove these recidivists from the communities that they repeatedly terrorize," Congress acted to "protect[]

tribal women and their children from generations of abuse." Pet. App. 41a (Owens, J., dissenting from denial of rehearing en banc).

Respondent asks this Court (Br. 8-9) to declare Section 117(a) unconstitutional as applied to repeat offenders whose prior tribal-court convictions—although valid—were uncounseled and resulted in a sentence of imprisonment. Nothing justifies that gutting of the statute. Because the Sixth Amendment was not violated when respondent's tribal-court convictions were obtained, that Amendment does not bar reliance on his valid convictions in a subsequent prosecution. And because Congress rationally made any tribal-court domestic-violence conviction, whether or not it was counseled or resulted in imprisonment, a predicate for a Section 117(a) prosecution, respondent has no valid claim that the statute violates due process. The Court should reject respondent's effort to transform his tribal-court sentences of imprisonment for his prior crimes into a shield that insulates him from prosecution under Section 117(a).

A. Reliance On Valid, Uncounseled Tribal-Court Misdemeanor Convictions In A Section 117(a) Prosecution Does Not Violate The Sixth Amendment

Respondent asserts (Br. 9-13) that all uncounseled convictions are unreliable, even if they did not violate the Sixth Amendment in the original proceeding. He contends (Br. 13-15) that the Sixth Amendment therefore forbids reliance on his uncounseled tribal-court misdemeanor convictions to satisfy a prior-conviction element of a recidivist crime. This Court's precedents refute respondent's premise and foreclose his claims.

1. In contending that uncounseled convictions are categorically unreliable, respondent observes (Br. 10)

that this Court has emphasized that the right to counsel functions as a "safeguard[] [that is] essential to the criminal justice system." Thus, he concludes (Br. 13), when convictions are obtained without the aid of counsel, they are so "inherently unreliable" that their subsequent use to prove a defendant's recidivist status violates the Sixth Amendment.

Respondent's reliability argument conflicts with this Court's recognition in *Scott* v. *Illinois*, 440 U.S. 367 (1979), that the Sixth Amendment does not require a right to appointed counsel to fairly convict a defendant in a misdemeanor prosecution. The holding in *Scott* that counsel is necessary only if the defendant is actually imprisoned demonstrates that, even in the absence of counsel, misdemeanor prosecutions are sufficiently reliable to find guilt beyond a reasonable doubt, to enter a conviction, to impose a criminal fine, and to subject a defendant to various collateral consequences.

Respondent asserts (Br. 12) that the Court in *Scott* and *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972), "effectively conclud[ed] [that] the criminal justice system tolerates less reliability for judgments obtained without counsel where only a fine is imposed." The "central premise" of the *Scott/Argersinger* rule, however, is not that reliability may be disregarded when a defendant is exposed to lesser sanctions, but that "actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment." *Scott*, 440 U.S. at 373. The *Scott/Argersinger* line reflects that counsel has a particularly important role to play when imprisonment is at stake, including in mitigating that penalty by, for example, negotiating a plea bargain that reduces the term of imprisonment. See *Arger-*

singer, 407 U.S. at 34. Those cases should not be interpreted to suggest that our society is unconcerned with the accuracy of a criminal proceeding that does not result in imprisonment. Accordingly, while access to counsel undoubtedly helps to safeguard the fairness and reliability of criminal proceedings, *Scott* and *Argersinger* demonstrate that the absence of counsel does not render all misdemeanor convictions unfair and unreliable.

This Court's decision in *Nichols* v. *United States*, 511 U.S. 738 (1994), confirms that point. If, as respondent maintains, all uncounseled convictions are unreliable, then reliance on such convictions as an accurate indicator of a defendant's recidivist status would be suspect, even if the prior convictions were valid under *Scott* because no imprisonment was imposed. Justice Marshall adopted precisely that view in *Baldasar* v. *Illinois*, 446 U.S. 222 (1980), reasoning that the subsequent use of a valid but uncounseled conviction violates the Constitution because of reliability concerns. *Id.* at 227-228. The dissent in *Nichols* likewise believed that the Sixth Amendment precludes reliance on uncounseled convictions in a later prosecution because of "the inherent risk of unreliability." 511 U.S. at 763 (Blackmun, J., dissenting).

But the *Nichols* majority did not agree. It "overrule[d] *Baldasar*" and held that a valid uncounseled conviction remains "valid when used to enhance punishment at a subsequent conviction." 511 U.S. at 748-749.[1] *Nichols* accordingly recognized that a valid

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[1] Respondent contends (Br. 20) that "*Nichols* overruled *Baldasar* because *Baldasar* incorrectly concluded the defendant's prior misdemeanor conviction in that case was invalid under *Scott*." That is not correct. The per curiam decision in *Baldasar* expressly

uncounseled conviction is sufficiently reliable not only to justify the punishment imposed in the original proceeding, but also to support the defendant's subsequent classification as a recidivist. And that makes sense: It would be strange to find an uncounseled conviction too unreliable in a recidivist prosecution to believe that the defendant committed the prior offense, when the original proceedings were sufficiently reliable to adjudicate the defendant guilty beyond a reasonable doubt.

Notably, respondent recognizes (Br. 35-36, 50) that uncounseled convictions may be relied upon in a later prosecution in a variety of circumstances without violating the Sixth Amendment, notwithstanding his reliability concerns. Respondent concedes (Br. 50) that if the tribal court had sentenced him to a fine rather than imprisonment, his convictions would be valid to prove his recidivist status in a Section 117(a) prosecution. He also acknowledges (Br. 35-36) that an uncounseled conviction may be relied on subsequently if the defendant waived his right to counsel or was not indigent and so lacked a right to appointed counsel in the prior proceeding. And respondent does not dispute that the Sixth Amendment permits reliance in a criminal prosecution on a prior civil adjudication, in which the defendant would not have had a right to appointed counsel. See U.S. Br. 27-28.

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recognized that the prior conviction was valid because the defendant was not incarcerated. 446 U.S. at 222. *Nichols* overruled *Baldasar* not because it had made a factual error about the conviction's validity, but because *Nichols* "agree[d] with the dissent in *Baldasar* that," as a matter of "logic[]," a conviction that is valid for its own purposes is also valid for use in a subsequent proceeding. 511 U.S. at 746-747.

But respondent does not explain why those uncounseled convictions or civil adjudications would be deemed sufficiently reliable to justify a recidivist prosecution, while an uncounseled tribal-court conviction that results in imprisonment would not. In all of the examples, the absence of counsel could theoretically undermine the accuracy of the prior proceedings and so trigger respondent's proposed Sixth Amendment rule. Respondent's resistance to the logical consequences of his position demonstrates that his Sixth Amendment analysis is unsound.

2. Rather than adopt a free-floating reliability analysis, *Nichols* establishes that the Sixth Amendment limitation on the subsequent use of an uncounseled conviction turns on whether the entry of the conviction violated the Sixth Amendment in the prior proceeding. U.S. Br. 23-26.[2] Respondent asserts (Br. 17-20) that the analysis in *Nichols* should be limited to sentencing enhancements and does not extend to statutes like Section 117(a) that make a prior convic-

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[2] *Nichols*'s focus on the validity of the prior conviction is consistent with *Burgett* v. *Texas*, 389 U.S. 109 (1967), *United States* v. *Tucker*, 404 U.S. 443 (1972), and *Loper* v. *Beto*, 405 U.S. 473 (1972) (plurality opinion). Respondent states (Br. 14) that those decisions "have, at their core, concerns about the reliability of the prior convictions." But the cases did not turn on abstract reliability concerns unmoored from whether the prior proceeding complied with the Sixth Amendment. Rather, in each case the defendant had previously been convicted of a felony without the assistance of counsel in violation of *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), and the Court reasoned that the subsequent use of the invalid convictions would perpetuate the *Gideon* violation and so cause the principle of that case "to suffer serious erosion." *Burgett*, 389 U.S. at 116; *Tucker*, 404 U.S. at 449; *Loper*, 405 U.S. at 481-482 (applying same rationale under due process).

tion an element of a recidivist offense. That argument lacks merit.

a. Respondent offers no tenable argument why a distinction between an element and a sentencing enhancement makes sense in this context. The substantive use of the prior conviction—to classify who qualifies as a recidivist and thus should be subject to habitual-offender liability or punishment—is the same. And in both instances, the mere existence of the prior conviction suffices to establish that the defendant is properly treated as a habitual offender. Thus, as this Court suggested in *Burgett* v. *Texas*, 389 U.S. 109 (1967), the same Sixth Amendment analysis should apply whether an uncounseled conviction is used "to support guilt *or* enhance punishment for another offense." *Id.* at 115 (emphasis added).

Respondent emphasizes (Br. 30-31) that the government bears the burden of proving a prior-conviction element beyond a reasonable doubt, which should not be "equate[d] * * * to the less exacting standard required at sentencing." It is of course true that different standards of proof apply at the guilt and punishment phases, but respondent does not explain why that difference should trigger divergent Sixth Amendment constraints on the subsequent use of an uncounseled conviction. The focus of proof in both contexts is on the *fact* of conviction, not on whether the defendant committed the underlying conduct.

Nor does treatment of a prior conviction as an element rather than a sentencing factor trigger a constitutional need for greater assurance that the defendant in fact committed the prior offense. A prior conviction itself establishes past criminal conduct; recidivist proceedings do not reopen that question. See *Graham*

v. *West Virginia*, 224 U.S. 616, 624 (1912). Thus, to prove a prior-conviction element, the government offers evidence that the conviction exists, without relitigating the defendant's culpability. Respondent's argument (Br. 48) that reliance on an uncounseled prior conviction at the guilt stage "impermissibly dilutes" the beyond-a-reasonable-doubt standard therefore lacks merit.

b. Respondent erroneously reads *Nichols* (Br. 23) to "stand for the proposition that prior convictions must be vetted to ensure their reliability before they can be used as proof in a subsequent federal prosecution." Respondent cites Justice Souter's concurrence in the judgment, which expressed the view that valid, uncounseled convictions may be considered at sentencing so long as they do not result in an automatic enhancement, because the defendant will have "the chance to convince the sentencing court of the unreliability" of any such conviction. 511 U.S. at 752.

Justice Souter wrote separately, however, precisely because the Court did not adopt that limitation. As Justice Souter observed, the sentencing scheme in *Baldasar* would not satisfy his test because it provided for an "automatic enhancement based on prior uncounseled convictions." *Nichols*, 511 U.S. at 751. *Nichols* nevertheless expressly overruled *Baldasar* and held that an uncounseled conviction that did not violate the Sixth Amendment when it was entered may be used to "enhance punishment at a subsequent conviction," *id.* at 748-749—even in cases, like *Baldasar*, where the enhancement is automatic and the sentencing court cannot disregard the prior conviction based on reliability concerns.

c. Respondent emphasizes (Br. 18-19) that *Nichols* observed that its holding was "also consistent with the traditional understanding of the sentencing process," during which a judge may conduct a broad inquiry into the defendant's background and sentence him "more severely based simply on evidence of the underlying conduct that gave rise to the previous" uncounseled conviction. 511 U.S. at 748. That observation reflects that many constitutionally permissible avenues exist for considering a defendant's criminal history at sentencing. But it does nothing to diminish *Nichols*'s holding that the Sixth Amendment is not violated if a court relies solely on the fact of a valid uncounseled conviction to establish that the defendant is a recidivist. The more relaxed standards at sentencing made it particularly clear that reliance on such a conviction, representing a finding of guilt beyond a reasonable doubt, formed a legitimate basis for enhancing a sentence. *Ibid.* But that same legitimate basis for treating a defendant as a repeat offender exists when a jurisdiction makes the fact of recidivism, proven by a prior adjudication of guilt beyond a reasonable doubt, an offense element.

Notably, the validity of the prior conviction, rather than the sentencing context, is what distinguished *Nichols* from *United States* v. *Tucker*, 404 U.S. 443 (1972), in which the Court held that a sentencing judge's reliance on uncounseled convictions that violated *Gideon* required resentencing. The *Tucker* Court recognized that sentencing courts have wide discretion in imposing sentences and may "conduct an inquiry broad in scope, largely unlimited either as to the kind of information [they] may consider, or the source from which it may come." *Id.* at 446, 449. Yet

Tucker held that, because the prior conviction had been obtained in violation of the Sixth Amendment, "[e]rosion of the Gideon principle can be prevented * * * only by" resentencing the defendant. *Id.* at 449.

Like *Tucker*, *Nichols* treats the validity of the conviction in the original proceeding as the touchstone for determining whether the subsequent use of that conviction violates the Sixth Amendment. Because that holding has equal application to a prior-conviction element, respondent cannot dismiss *Nichols* as a punishment case.

d. Citing *Alabama* v. *Shelton*, 535 U.S. 654 (2002), respondent claims (Br. 21-22) that this Court has "affirmed the limited reach of *Nichols*" to situations where "guilt has been established" before an uncounseled conviction is considered. But the question presented in *Shelton* did not concern the permissible uses of prior convictions in a subsequent prosecution; rather, the Court considered only whether the Sixth Amendment requires appointed counsel to sentence a defendant to a suspended term of imprisonment. 535 U.S. at 662. In analyzing that issue, *Shelton* distinguished *Nichols* because "the critical point" in *Nichols* "was that the defendant had a recognized right to counsel when adjudicated guilty of the felony offense for which he was imprisoned," *id.* at 664—just as respondent had a recognized right to counsel in his Section 117(a) prosecution. *Shelton* thus reaffirmed *Nichols*'s point that the sentence imposed in a recidivist prosecution is attributable to the instant conviction, and not to predicate prior convictions in which the defendant lacked the assistance of counsel. See *ibid.*

e. Respondent disputes that point (Br. 7) by contending that when a prior conviction is an element of a subsequent offense, the defendant "face[s] incarceration" in the federal proceeding "based in part on convictions that were uncounseled." Respondent asserts (Br. 29) that Section 117(a) is "[u]nlike a true recidivist statute," which this Court has repeatedly held "penalize[s] only the last offense committed by the defendant," because it makes prior convictions relevant to establishing guilt. But respondent cites no authority to support his claim that a sentence imposed for a Section 117(a) crime should be imputed to the prior convictions that made the defendant eligible for prosecution under that statute. That suggestion contradicts longstanding authority recognizing that governments have wide discretion in how to structure recidivist proceedings. See *Spencer* v. *Texas*, 385 U.S. 554, 566-569 (1967).

Contrary to respondent's contention, Section 117—which is titled "Domestic assault by *an habitual offender*"—functions like other recidivist provisions. 18 U.S.C. 117 (emphasis added). It is violated only when a person with two prior domestic-violence convictions "commits a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country." *Ibid.* The statute clearly penalizes the last offense and relies on the existence of the prior convictions to identify the class of offenders who should be subject to that penalty. That the sorting occurs at the guilt stage rather than the punishment stage does not alter the function of the prior convictions to limit the Section 117(a) penalty to recidivists. Section 117(a) therefore fits comfortably within the long line of this Court's precedents holding that recid-

ivist statutes do not impose additional punishment for prior crimes, but rather provide "a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." *Gryger* v. *Burke*, 334 U.S. 728, 732 (1948).

f. Taking respondent's element-based theory to its logical end, any uncounseled conviction—even one obtained in compliance with *Scott*—would violate the Sixth Amendment if used to prove an element of a recidivist offense. That result would resurrect *Baldasar*'s creation of a class of "hybrid" convictions that are valid for purposes of imposing punishment in the original prosecution, but invalid when used in a subsequent prosecution. *Nichols*, 511 U.S. at 744-745; *Baldasar*, 446 U.S. at 232 (Powell, J., dissenting). Having overruled *Baldasar* in *Nichols*, the Court should decline to return to a Sixth Amendment analysis that uncouples the permissibility of relying on a prior conviction from the conviction's validity.

3. Respondent alternatively seeks (Br. 19) to avoid *Nichols* by arguing that its application is "contingent upon a valid prior conviction under *Scott*." Because the tribal court sentenced respondent to imprisonment for his domestic-violence crimes, he observes (Br. 36) that he would have had a right to appointed counsel if he had been sentenced in state or federal court. Thus, although he acknowledges (Br. 37) that his uncounseled tribal-court convictions are valid and were lawfully used to impose a sentence of imprisonment in the tribal proceeding, he contends that the analysis in *Nichols* does not apply to those convictions. That argument is wrong for multiple reasons.

First, *Nichols*'s Sixth Amendment rule that a valid uncounseled conviction remains valid when used in a

subsequent prosecution logically applies to any uncounseled conviction that did not violate the Sixth Amendment when it was entered, and is not limited based on *Scott*. Respondent emphasizes the facts of *Nichols*, but fails to explain why they circumscribe the case's rationale. Contrary to respondent's argument, courts have recognized, for example, that the Sixth Amendment permits reliance on a prior civil adjudication to establish an element of a recidivist offense even though the defendant had no right to appointed counsel in the civil proceeding. See, *e.g.*, *United States* v. *Rivera-Sillas*, 417 F.3d 1014, 1017-1018 (9th Cir. 2005) (rejecting argument that 8 U.S.C. 1326, which criminalizes unlawful reentry following deportation, violates the Sixth Amendment because it makes an administrative adjudication, in which the defendant had no right to appointed counsel, an element of a subsequent felony offense), cert. denied, 546 U.S. 1120 (2006). The same analysis applies to uncounseled tribal-court convictions that did not violate the Sixth Amendment at the time they were imposed because of the Amendment's inapplicability to tribal-court proceedings.

Second, uncounseled misdemeanor convictions are valid under *Scott* and may be relied upon in a subsequent proceeding even if a defendant was unconstitutionally sentenced to imprisonment in the original prosecution. U.S. Br. 33-35.[3] *Scott* makes clear that,

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[3] Respondent and his amici are therefore wrong to contend that non-Indians receive more favorable treatment under Section 117(a) than Indians. Resp. Br. 51; Professor Barbara L. Creel et al. Amicus Br. 13-20. All uncounseled misdemeanor convictions are valid under *Scott* and so may be used subsequently, no matter

in misdemeanor cases, the absence of counsel bars only a sentence of imprisonment, not an adjudication of guilt. See 440 U.S. at 373-374. Respondent observes (Br. 32) that even if his tribal-court convictions were valid, his sentences of imprisonment would have contravened *Scott* had they been imposed by a state or federal court. But Section 117(a) is not concerned with what *sentence* a defendant previously received for a domestic assault; rather, the recidivist element is satisfied based on the existence of two prior *convictions*. Respondent further asserts (Br. 34) that, under *Argersinger*, a prison sentence renders an accompanying uncounseled misdemeanor conviction invalid. But *Argersinger* did not say that the unconstitutional imposition of a term of imprisonment would invalidate the conviction itself.

Third, although respondent grounds his Sixth Amendment analysis in reliability concerns, his argument that his tribal-court sentences should control the permissibility of using his convictions in a federal-court proceeding is entirely disconnected from those concerns. Imagine, for example, that respondent's tribal-court record remained unchanged in all respects except that he was twice fined instead of imprisoned for committing domestic violence. Because those uncounseled convictions would be based on exactly the same evidence and would be obtained using identical procedures, their reliability would stand on the same plane as respondent's own convictions. Yet respondent concedes (Br. 50) that those uncounseled convictions could be used to satisfy Section 117(a)'s prior-conviction element. The Court should reject respond-

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where they were rendered and no matter whether a sentence of imprisonment was unlawfully imposed.

ent's counterintuitive effort to escape prosecution under Section 117(a) based on his tribal court's sentencing determinations.

B. Reliance On Valid, Uncounseled Tribal-Court Misdemeanor Convictions In A Section 117(a) Prosecution Does Not Violate Due Process

Respondent does not dispute that Congress's decision to permit reliance on uncounseled tribal-court convictions is subject to rational-basis review. U.S. Br. 41-43; see *Lewis* v. *United States*, 445 U.S. 55, 65 (1980).[4] And respondent does not contend that it was irrational for Congress to address the acute problem of domestic violence in Indian country by closing the jurisdictional gap that permitted recidivist offenders to avoid felony-level punishment despite repeated acts of violence. U.S. Br. 43-48. Instead, respondent attempts to avoid decision on whether Section 117(a) complies with due process and renews his claim that

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[4] Respondent emphasizes (Br. 15-16) that the criminal prosecution in *Lewis* enforced a civil firearms disability, which he contends distinguishes the felon-in-possession offense from Section 117(a). It is true that Section 117(a) does not enforce a civil disability; rather, the statute takes an act that is *already* criminal—domestic assault—and creates a felony offense if an individual commits that unlawful act after having previously been twice convicted of domestic violence. But that difference does not create a constitutional infirmity. In fact, as Judge Watford observed, greater caution is required when relying on "uncounseled prior convictions in prohibiting firearms possession, because that prohibition impinges upon what would otherwise be a fundamental right." Pet. App. 19a. In contrast, it does not "imping[e] upon anyone's rights when [Congress] prohibit[s] (or enhance[s] penalties for) domestic violence, since no one has the right to abuse a spouse or intimate partner to begin with." *Ibid.*

uncounseled convictions are unreliable. Those arguments lack merit.

1. Respondent urges the Court (Br. 38-42) not to consider whether Section 117(a) survives scrutiny under due process principles because he asserts he did *not* press that claim below and it was not the basis of the court of appeals' decision. But the Ninth Circuit understood respondent to be raising a due process claim, Pet. App. 4a, and he is apparently unwilling to concede that he forfeited that claim, see Resp. Br. 38 (requesting a remand for the court of appeals to consider due process). Moreover, as respondent acknowledges (Br. 38), the due process and Sixth Amendment issues are closely linked in this context. Cf. *Loper*, 405 U.S. at 480 (relying on due process to analyze whether uncounseled felony conviction could be introduced into evidence for impeachment purposes in a subsequent prosecution). Because respondent's reliability concerns sound equally in due process, it would make little sense to confine the analysis in this case to the Sixth Amendment.

Indeed, in analogous circumstances—including in *Lewis* and *Nichols*—this Court has addressed the constitutionality of a statute under the Fifth Amendment even when the lower court decision was focused on the Sixth Amendment. See *Lewis*, 445 U.S. at 65 (holding that subsequent reliance on an uncounseled felony conviction was "consonant with the concept of equal protection embodied in the Due Process Clause of the Fifth Amendment," even though the lower court did not expressly address that issue and the defendant raised only a Sixth Amendment claim in his opening brief); *Nichols*, 511 U.S. at 748-749 (rejecting a due process argument in addition to a Sixth Amendment

argument even though the lower court had not addressed due process); see also, *e.g.*, *Kentucky* v. *Stincer*, 482 U.S. 730, 744-745 (1987) (reversing lower court decision that was based solely on the Sixth Amendment and holding that the defendant's exclusion from a witness competency hearing did not violate the Confrontation Clause or due process). Accordingly, a complete analysis encompasses the due process issue in this case.

2. a. In arguing that it was irrational for Congress to permit reliance on uncounseled tribal-court misdemeanor convictions that resulted in imprisonment, respondent reiterates (Br. 46-49) his view that those convictions are unreliable.[5] That argument fares no better under due process than it does under the Sixth Amendment. See pp. 3-6, *supra*; U.S. Br. 48-54. Because respondent cannot establish that uncounseled misdemeanor convictions are categorically unreliable, he cannot invalidate Section 117(a) on that ground.[6]

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[5] Pursuing a different tack, amici Criminal Justice Organizations and Scholars contend (Br. 7-18) that Section 117(a) should be interpreted to exclude uncounseled tribal-court convictions. That argument lacks merit. Amici cite the presumption that Congress legislates with awareness of existing law, but that presumption refutes their claim because it shows that Congress enacted Section 117(a) with awareness that defendants have no right to appointed counsel in tribal-court misdemeanor proceedings. U.S. Br. 42; cf. *United States* v. *First*, 731 F.3d 998, 1007 (9th Cir. 2013), cert. denied, 135 S. Ct. 50 (2014). Amici also invoke (Br. 9-12) the canon that ambiguous statutes should be construed liberally in favor of Indians. But no ambiguity exists: Section 117(a) plainly covers all tribal-court convictions. In any event, a liberal construction should favor the Indian victims of domestic violence, not the Indian perpetrators who repeatedly abuse their intimate partners.

[6] Perhaps because the government's opening brief used the term "categorically" (meaning "without exception") when discussing

b. Respondent's amici focus more narrowly on tribal-court prosecutions, contending that various procedural infirmities render tribal-court adjudications unfair. See National Ass'n of Criminal Def. Lawyers (NACDL) et al. Amicus Br. 11-34; see also Resp. Br. 27-28. This Court should resist NACDL's invitation to hold Section 117(a) unconstitutional on the basis of those dated anecdotal attacks.

Both in permitting uncounseled tribal-court convictions to serve as predicate offenses for a Section 117(a) crime and in determining which procedural protections to confer under the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. 1301 *et seq.*, Congress has determined that tribal courts may fairly and reliably adjudicate the guilt of uncounseled defendants in misdemeanor prosecutions. See U.S. Br. 48-52. Tribal justice systems—and the right to counsel in particular—have been the focus of congressional hearings and debates, and Congress has confirmed its confidence in tribal courts by "repeatedly recogniz[ing] tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and

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reliability, respondent contends (Br. 43) that the categorical approach governs whether a tribal-court conviction qualifies as a predicate offense under Section 117(a). Respondent further contends (Br. 44-45) that the tribal provision he violated "is nondivisible and thereby not subject to the modified categorical approach." As respondent recognizes (Br. 45), those arguments fall outside the question presented and are not properly considered in this case, which involves only whether reliance on uncounseled tribal-court misdemeanor convictions violates the Constitution. Respondent's arguments address the different question whether his particular tribal-court convictions qualify as predicates under Section 117(a). Respondent has never argued that his convictions do not qualify. Accordingly, he has forfeited that argument.

property rights on Native lands." 25 U.S.C. 3651(6) (enacted in 2000); see 25 U.S.C. 3601(6) (similar finding enacted in 1993). While Congress has provided tribal-court defendants with a federal habeas corpus remedy, 25 U.S.C. 1303, it has rejected proposals for expanded federal-court oversight of tribal-court proceedings. See S. Rep. No. 153, 102d Cong., 1st Sess. 55-61 (1991) (relying on report by the U.S. Commission on Civil Rights, which conducted a five-year review of tribal governments and recommended against increased federal-court review of tribal-court judgments). Congress is well positioned to gather information about how tribal courts operate, to assess their overall fairness, and to devise tailored solutions to any problems it identifies in tribal criminal-justice systems. This Court should not usurp Congress's role and nullify a central application of Section 117(a) based on impressionistic assertions about unfairness in tribal-court proceedings.

In any event, NACDL's depiction of tribal-court criminal-justice systems rests primarily on one-sided anecdotal accounts that do not reflect any comprehensive study of how tribal courts function.[7] In stark contrast to NACDL's portrayal, commenters have observed that "[w]hen tribal courts have been sub-

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[7] For example, NACDL discusses the 2003 tribal prosecution of Fortino Alvarez at length. NACDL Br. 11, 14-15. But NACDL ignores that Alvarez's allegations about procedural deficiencies at his trial were largely rejected by the magistrate judge and the district court. See *Alvarez* v. *Tracey ex rel. Gila River Indian Cmty. Dep't of Rehab. & Supervision*, No. 08-cv-2226, 2012 WL 1038755, at *1 (D. Ariz. Feb. 10, 2012), report and recommendation adopted *sub nom.*, No. 08-cv-02226, 2012 WL 1038746 (D. Ariz. Mar. 28, 2012), aff'd, 773 F.3d 1011 (9th Cir. 2014) (declining to consider the claims based on the failure to exhaust).

jected to intense scrutiny" in congressional hearings and academic studies, "they have survived the test." Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 Am. Indian L. Rev. 285, 287 (1997); see, *e.g.*, Samuel E. Ennis, *Reaffirming Indian Tribal Court Criminal Jurisdiction Over Non-Indians: An Argument for a Statutory Abrogation of* Oliphant, 57 UCLA L. Rev. 553, 584-588 (2009) (citing studies "conclud[ing] that tribal courts are generally as fair and impartial as their state and federal counterparts").

NACDL selectively cites cases (Br. 29) that it contends demonstrate that tribal courts may not "be relied upon to enforce ICRA rights." But scholars and practitioners who have studied the application of ICRA have concluded that "[t]ribal courts have developed substantive ICRA doctrines with real bite." Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 Fordham L. Rev. 479, 522 (2000); see, *e.g.*, Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 Idaho L. Rev. 465, 489 (1998) (examining thirty years of litigation under ICRA and concluding that "tribal courts have been no less protective of civil rights than have federal courts"); *Cohen's Handbook of Federal Indian Law* § 14.04[2], at 988 (Nell Jessup Newton et al. eds., 2012) (citing studies that contradict the notion that "tribal courts are incapable or unwilling to enforce" ICRA). Notably, as evidence for the proposition that tribal courts do not faithfully enforce ICRA, NACDL cites (Br. 29 & nn.106-107) Matthew L.M. Fletcher, *Indian Courts and Fundamental Fairness:* Indian Courts

and the Future *Revisited*, 84 U. Colo. L. Rev. 59 (2013). But NACDL ignores the author's conclusion that courts that have declined to rely on ICRA generally have done so "to provide stronger guarantees of fundamental fairness under tribal law than would have been available in applying American jurisprudence in the areas of due process and equal protection." *Id.* at 91.

NACDL's suggestion that tribal-court proceedings are fundamentally unfair is further contradicted by the decisions of state and federal courts that have credited tribal-court judgments as reliable in a variety of contexts. See U.S. Br. 52-54; National Congress of Am. Indians Amicus Br. 14-18.[8] Under the Sentencing Guidelines, for example, federal courts may rely on tribal-court convictions as the basis for an upward departure if they conclude that those convictions reliably indicate that the defendant's criminal-history category is inadequate. See Sentencing Guidelines § 4A1.3(a)(1) and (2)(A). Federal courts routinely find that tribal-court convictions satisfy that test. See Kevin K. Washburn, *Tribal Courts and Federal Sentencing*, 36 Ariz. St. L.J. 403, 436 (2004) ("Despite the general rarity of upward departures, federal judges have often used the existence of a lengthy tribal criminal history to justify an upward departure

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[8] Respondent contends (Br. 51-52) that the absence of counsel in tribal-court misdemeanor prosecutions provides a "policy reason not to extend comity" to those convictions under Section 117(a). But Congress *mandated* that those convictions count under Section 117(a). The respect routinely accorded to tribal-court judgments in other contexts where that matter is left to courts' discretion simply confirms that Congress acted rationally in making tribal-court convictions predicates in a Section 117(a) prosecution.

in Indian country cases.") (footnote omitted).[9] That judgment merits more respect than NACDL's generic allegations of "incompetence," which the Court has previously rejected as the basis for "attacks on tribal court jurisdiction." *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U.S. 9, 18-19 (1987).

c. If the Court finds that Section 117(a) does not facially violate the Constitution, respondent urges the Court (Br. 27-29, 52) to recognize a right of individualized review of predicate tribal-court convictions in Section 117(a) prosecutions. That argument is not properly presented here. Respondent has never sought such review of his convictions; instead, he has argued only that uncounseled tribal-court misdemeanor convictions that resulted in imprisonment are categorically unavailable for use in a federal proceeding. Because an as-applied due process challenge has not been preserved or briefed, the Court should not consider the question whether a defendant may

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[9] Respondent argues (Br. 27) that it would be "illogical" to rely on uncounseled tribal-court convictions in a prosecution under Section 117(a) because the Sentencing Guidelines do not assign criminal-history points based on tribal offenses. Sentencing Guidelines § 4A1.2(i). But the Guidelines permit reliance on tribal-court convictions for the related purpose of granting an upward departure when a defendant's criminal-history category is understated, Sentencing Guidelines § 4A1.3(a)(1) and (2)(A), and consideration of tribal-court convictions "is generally encouraged" under that provision. *United States* v. *Lonjose*, 42 Fed. Appx. 177, at *3 (10th Cir.), cert. denied, 537 U.S. 984 (2002). In any event, the Guidelines' approach to tribal-court convictions does not align with respondent's constitutional analysis because Section 4A1.2(i) treats all tribal-court convictions the same, whether or not they were counseled or resulted in imprisonment.

collaterally challenge his tribal-court convictions in a Section 117(a) prosecution.

At a minimum, a defendant raising a collateral attack should have to show that his particular tribal-court proceedings were so procedurally defective that they "effectively eliminate[d] [his] right * * * to obtain judicial review," notwithstanding ICRA's guarantee of a federal habeas corpus remedy. Cf. *United States* v. *Mendoza-Lopez*, 481 U.S. 828, 839 (1987) (recognizing limited right to collaterally challenge an administrative deportation order in a prosecution for illegal reentry following deportation); *Daniels* v. *United States*, 532 U.S. 374, 383 (2001) (plurality opinion) (reserving whether 28 U.S.C. 2255 permits a defendant to collaterally attack a prior conviction used to enhance a federal sentence in the "rare case[] in which no channel of review was" previously available "due to no fault of [the defendant's] own"). A defendant should also have to show that the tribal-court proceedings were fundamentally unfair and caused him to suffer actual prejudice. Cf., *e.g.*, *United States* v. *Espinoza-Farlo*, 34 F.3d 469, 471 (7th Cir. 1994). The Court should reserve judgment on those issues until they are presented in a case, unlike this one, in which a defendant alleges and can demonstrate that his tribal-court prosecutions were fundamentally flawed.

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The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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